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NO. 80-1968

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAVID RUSSELL HUDSON,
Petitioner,

v.

UNITED STATES OF AMERICA and its Secretary of the Interior, THOMAS S. KLEPPE, and VERNADINE REED STEARNS, LOIS JEAN REED SAXTON, MILDRED REED ANDERSON, and IVAN STACY REED CLEVELAND,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT
By: STEVEN S. ANDERSON
Attorneys for Respondents

Office and P. O. Address:
208 Pioneer Building
600 First Avenue
Seattle, Washington 98104
(206) 623-1255

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QUESTIONS PRESENTED

A. Whether the Ninth Circuit Court of Appeals correctly concluded that the Secretary of the Interior's determination of heirs in an Indian intestate probate proceeding conducted pursuant to 25 U.S.C. § 372 was not subject to judicial review by the district court because of the statute's command that the Secretary's decision was "final and conclusive."

B. Derivatively, whether the Ninth Circuit Court of Appeals correctly concluded that the final agency decision did not raise constitutional questions avoiding the ban on judicial review in § 372. The administrative agency had overturned the ruling in Petitioner's favor of a substitute administrative law judge who had not heard the evidence, on the ground that there was, in any event, insufficient

evidence presented to sustain petitioner's burden of proof concerning his alleged relationship to the deceased Indian whose estate was probated.

TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of Argument	12
Argument	14
The Petition for Certiorari Presents No Issues Deserving Supreme Court . .	14
Conclusion.	20

TABLES OF AUTHORITY

Table of Cases

Arenas v. United States, 198 F.2d 418 (9th Cir. 1952) 16

Codd v. Velger, 492 U.S. 624 (1977) 17

First Moon v. Whitetail, 270 U.S. 243 (1926). 15

Johnson v. Kleppe, 596 F.2d 950 (10th Cir. 1979). 16

Tooahnippah v. Hickel, 297 U.S. 598 (1970). 12,15-16

United States v. Raddatz, ___ U.S. ___, 65 L. Ed. 2d 424 (1980). 13,18

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 18,19

Page

Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129 (2d Cir.), cert. den., 389 U.S. 839 (1967) 18-19

Youakim v. Miller, 425 U.S. 231 (1976). 19

Constitutional Provisions

U. S. Const. amend. V 13,19

Statutes

5 U.S.C. § 701(a)(1). 16

25 U.S.C. § 372 2,11,12,15

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STATEMENT OF THE CASE

Petitioner David Hudson seeks review of the decision of the Ninth Circuit Court of Appeals affirming the district court's dismissal of his original complaint which had sought judicial review of an order of

the Secretary of the Interior determining the heirs in an Indian intestate probate proceeding. The decision of the Secretary of the Interior, through his designate, the Board of Indian Appeals of the Office of Hearings and Appeals, is dated September 2, 1976. (App. 3) The court of appeals held that the decision of the Secretary in Indian intestate probate matters was made "final and conclusive" under 25 U.S.C. § 372 and not subject to judicial review. (App. 1) It held further that the petitioner had failed to demonstrate the existence of any constitutional issue which would avoid the rule of nonreviewability.

The administrative proceedings began more than 30 years ago when Alvin Hudson, Quinault Allottee Number 1139, whose estate is in controversy in these proceedings, died intestate on January 13, 1949. On December 30, 1949, pursuant to 25 U.S.C. § 372 and the regulations promulgated by the

Department of the Interior, an Interior Department inheritance examiner entered an order determining heirs, naming respondents Lois Saxton, Vernadine Stearns, Mildred Anderson and Ivan Cleveland, nieces and nephews of Alvin Hudson, his sole heirs. Almost two decades later, on August 21, 1968, Petitioner David Russell Hudson filed a petition with the Department of the Interior to reopen the Alvin Hudson estate on the ground that he was the illegitimate son and lawful heir of Alvin Hudson. The petition was denied by the hearing examiner on August 27, 1968, on the ground that the petition was not filed within three years of the decision of the examiner of inheritance as required by the federal regulations in effect.

Petitioner filed an administrative appeal with the regional solicitor, who on May 29, 1969, reversed the examiner's denial on the ground that the Secretary had

discretion to reopen the estate despite the three-year limitation because of David Russell Hudson's allegation that he filed the petition within three years of the time that he learned of his alleged relationship to Alvin Hudson.[1]

The matter was remanded to Hearing Examiner Montgomery before whom two evidentiary hearings were held, one on June 26, 1972, and one on April 24, 1973.

For present purposes, the key issue at the administrative hearings concerns the credibility of Petitioner's primary witness, his mother, Helen Paskas Jenna, then Helen Paskas, who testified that Alvin Hudson was Petitioner's father. At the

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[1] One of the exhibits to the administrative record, however, reveals that the petition was not filed until more than three years after Petitioner's mother advised him by letter of his purported relationship to Alvin Hudson. See Pet. Exhibit B-12, letter of May 27, 1965.

first hearing, she testified that from February to November, 1941, she was employed as a domestic by the welfare department of the State of Washington. She testified that she worked in a number of Indian homes, including the Hudson family home where Alvin Hudson lived along with his parents and his sister and brother-in-law, Mildred and Benjamin Reed. According to Mrs. Jenna, David Hudson was conceived as a result of her having been raped by Alvin Hudson. She testified that one night in May, 1941, Alvin Hudson came home drunk, "after his mother and sister had gone to bed," and raped her in the living room where she had been ironing. (Tr. 22) She testified that she did not report the rape to the police or divulge it to anyone, that she continued to work in the Hudson home after the alleged rape had occurred. She testified further that she never had a

romantic relationship with Alvin Hudson and had never told him about her pregnancy. (Tr. 23)

A second witness for petitioner at the first hearing, however, Alvin Hudson's first cousin, Martha Boyer, testified that Helen Paskas and Alvin Hudson had been involved in a romantic relationship during the period in question and that they had lived together prior to David's birth. She testified that Alvin Hudson knew of her pregnancy and inquired about it. (Tr. 27-29)

At the second hearing, to rebut this evidence, the respondent original heirs called Benjamin Reed, Alvin Hudson's brother-in-law and Frank Pinkerell, Alvin Hudson's uncle, to testify. Reed testified that he and his wife Mildred, Alvin's sister, had lived with Alvin Hudson in Alvin's parent's home at the time in question. He stated that he did not know

Helen Paskas Jenna and that during the time the alleged rape occurred his wife Mildred had done all of the housework at the Hudson home. (Tr. 63) He testified further that because of the way the house was laid out it would have been impossible to rape someone in the living room without waking persons sleeping in the bedroom only fifteen feet away. (Tr. 66) Pinkerell testified that as Alvin Hudson's uncle and neighbor he was a frequent guest in the Hudson home and that he did not know Helen Paskas Jenna or anything about the alleged rape. (Tr. 82) He also testified that Mildred Reed, not Helen Paskas, had done all the housework at the Hudson home.

Mrs. Jenna was then recalled on behalf of the petitioner. This time, however, she testified that she had been raped in the morning, not at night as she had originally stated, and that at the time of the rape, Mrs. Hudson and Mildred Reed were not

sleeping as she originally testified, but were not at home. (Tr. 97-98) She testified concerning the layout of the Hudson home and described that there had been a bathroom off the living room where she had been raped. (Tr. 100)

On rebuttal, Frank Pickerell testified that the Hudson home did not have an indoor bathroom at the time because he had personally installed a bathroom in the house after Alvin Hudson died. (Tr. 102-103) No further corroboration of Mrs. Jenna's testimony was offered.

After both hearings had been held, but before Hearing Examiner Montgomery issued a decision, he died. Subsequently, on April 9, 1975, Administrative Law Judge Robert Snashall, who had not heard any of the evidence, rendered a decision that Alvin Hudson was the father of David Hudson based on his reading of the transcript of the hearings. Judge Snashall subsequently

entered an order divesting the original heirs and substituting David Hudson as the sole heir. On January 21, 1976, Judge Snashall denied the original heirs' petition for rehearing and the original heirs, respondents here, filed an administrative appeal to the Interior Board of Indian Appeals of the Department of the Interior pursuant to the Department's regulation. In the petition for rehearing and in the administrative appeal, the original heirs argued that Judge Snashall had erroneously overturned the original determination of heirs without hearing the contested evidence.

The Interior Board of Indian Appeals (IBIA) did not reach that issue but on September 2, 1976, reversed and vacated Judge Snashall's order of April 9, 1975, and reinstated the original 1949 Order Determining Heirs. The Board concluded

that David Russell Hudson had not established by a preponderance of the evidence that Alvin Hudson was his father. The IBIA concluded from its review of the evidence that his entire case rested on the "uncorroborated and somewhat conflicting testimony of Mrs. Jenna that the appellee (petitioner David Hudson) was the result of the rape". (App. 5) The IBIA held that Mrs. Jenna's testimony, rendered some twenty-three years after the alleged crime had occurred, was not sufficient to sustain a finding in David Hudson's favor. (App. 5-6) The issues regarding the credibility of Mrs. Jenna had been briefed extensively by the parties in the administrative appeal.

On November 4, 1976, David Russell Hudson sued the United States, the Secretary of the Interior and the original heirs in federal district court. He alleged that the IBIA erred in judging the credibility

of witnesses without having heard the evidence and that the initial decision was not valid because the officer who had decided the case had not also heard the evidence, a contention which had not been raised by petitioner in the administrative proceeding. The United States and the original heirs filed motions to dismiss for lack of jurisdiction on the ground that 25 U.S.C. § 372 precluded judicial review of the Secretary's decision. The United States and the original heirs also argued that the IBIA's decision was supported by substantial evidence. On March 6, 1979, the district court granted the Secretary's and original heirs' motions to dismiss for lack of jurisdiction with prejudice, (App. 2), and, as noted above, the Ninth Circuit Court of Appeals subsequently affirmed.

This petition for certiorari followed.

SUMMARY OF ARGUMENT

The petition for certiorari raises no substantial legal issues. There are no conflicts between the courts of appeals or state courts of last resort with respect to the questions presented. The federal courts have uniformly held that 25 U.S.C. § 372, which makes the Secretary's decision in an Indian intestate probate matter "final and conclusive", bars judicial review by the federal courts. See Tooahnippah v. Hickel, 297 U.S. 598, 607 (1970).

Petitioner argues that a constitutional error has occurred avoiding the bar on judicial review because a substitute law judge initially heard the case. But that initial decision, in Petitioner's favor, was reversed by the agency in the administrative appeal.

The federal courts are in unanimous agreement that there is no constitutional

requirement that the ultimate decision maker on issues of fact personally hear the evidence even where the credibility of witnesses may be an important factor in deciding the issue. See United States v. Raddatz, ___ U.S. ___, 65 L. Ed. 2d 424, 435-436 (1980). Here, because the decision of the substitute administrative law judge was in Petitioner's favor, and because petitioner did not raise the issue in the administrative appeal, Petitioner should not now be heard to complain. The substitution of law judges was cured, in any event, in the administrative appeal when the agency ruled that there was insufficient evidence presented to support a decision in Petitioner's favor.

The Fifth Amendment argument concerning the asserted invalidity of the statutory distinction between Indian will and intestate cases, with respect to the

availability of judicial review, was not presented below and should not be considered.

ARGUMENT

The Petition for Certiorari Presents No Issues Deserving Supreme Court Review

The petition for certiorari raises no legal issues of any substance. There is no conflict between the decisions of any of the courts of appeals or state courts of last resort, no important questions of federal law presented, and no tension, much less conflict, with any decisions by this Court. The issues the petition attempts to raise are well settled.

At the administrative level, in the hearings before the administrative law judge and in the administrative appeal to the Department of the Interior's Office of Hearings and Appeals, the underlying questions of fact as to whether Alvin Hudson had raped Petitioner's mother and

whether David Hudson was the illegitimate son of Alvin Hudson were vigorously litigated. These fact issues were resolved against Petitioner at the administrative level by the IBIA. After reviewing the record it noted that Mrs. Jenna's testimony was uncorroborated and somewhat conflicting, given more than twenty-three years after the alleged crime, and never divulged to anyone. (App. 5) It concluded on its review of the record that the evidence presented by Petitioner was insufficient to meet the preponderance of the evidence standard.

The federal courts have uniformly held that the Secretary's decisions concerning Indian intestate heirship matters pursuant to 25 U.S.C. § 372 are not subject to judicial review because the agency's decision is made "final and conclusive" by the statute. See First Moon v. Whitetail, 270 U.S. 243, 244 (1926); Tooahnippah v.

Hickel, 297 U.S. 598, 607 (1970); Johnson v. Kleppe, 596 F.2d 950, 952 (10th Cir. 1979); Arenas v. United States, 198 F.2d 418, 420-422 (9th Cir. 1952). As this Court observed bluntly in Tooahnippah, "Congress quite plainly stated that the Secretary's action [pursuant to § 372] was not to be subject to judicial scrutiny." 297 U.S. at 607. The statute's ban on judicial review was preserved by § 10 of the Administrative Procedure Act which provides that administrative decisions are not subject to judicial review where the "statute precludes judicial review." 5 U.S.C. § 701(a)(1).

Petitioner's argument that the rule of nonreviewability is circumvented because an error of constitutional dimension has occurred is improperly raised and foreclosed by a recent decision of this Court. As respondents understand it, the error identified by Petitioner occurred at the

lower level of the administrative agency when Judge Snashall ruled without having heard the evidence after the death of the first administrative law judge. But since Judge Snashall's decision was in Petitioner's favor, Petitioner has failed to demonstrate how he was harmed by this alleged error, a prerequisite to successful challenge of erroneous agency action. See Codd v. Velger, 492 U.S. 624, 629 (1977). Further, not only did Petitioner fail to complain of the error before the agency, he argued before IBIA that it was proper for Judge Snashall to have disinherited the original heirs without hearing the evidence. Petitioner is estopped from changing positions now.

In addition, it is the final agency that is subject to judicial review, not the initial decision of the administrative law judge, and the federal courts have uniformly held that the agency is the ultimate

fact finder notwithstanding the fact that the appellate level of the administrative agency has not heard the testimony. The agency itself is not compelled to defer to the findings of a hearing officer even if the officer has heard the testimony. See e.g., Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). Last term, this Court held that the due process clause of the Fifth Amendment does not require that the trier of fact personally hear the evidence in every case where the credibility of witnesses may be an important factor in the decision. United States v. Raddatz, ___ U.S. ___, 65 L. Ed. 2d 424, 435-436 (1980).

The lower federal courts have uniformly held that there is no constitutional requirements of a de novo hearing where the initial examiner is no longer present and the credibility of witnesses is at issue, see Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129, 131 (2d Cir.), cert. den.,

389 U.S. 839 (1967), and in any event any error there was cured during the administrative appeal when the IBIA concluded that no purpose would be served by a further hearing since Petitioner had, in any event, failed to produce sufficient evidence to sustain his burden of proof. Since the agency could have overturned an administrative law judge who did hear the evidence, see Universal Camera Corp., supra, clearly the agency can properly overturn the substitute administrative law judge.

Petitioner's further argument that the statutory distinction with respect to the availability of judicial review in Indian will cases but not in Indian intestate cases is a violation of the Fifth Amendment was not raised before the district court or court of appeals and should not be considered here. See Youakim v. Miller, 425 U.S. 231, 234 (1976).

Finally, there was clearly substantial evidence to support the decision of the IBIA in light of the numerous conflicts in Mrs. Jenna's testimony concerning the paternity of her son and the conflicts with the testimony of other witnesses. Supreme Court review will therefore only prolong this already 30-year-old probate proceedings, without changing the ultimate result.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted this 22nd day of June, 1981.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By: STEVEN S. ANDERSON
Attorneys for Respondents
Vernadine Reed Stearns,
Lois Jean Reed Saxton,
Mildred Reed Anderson,
and Ivan Stacy Reed
Cleveland